No. 21,166

IN THE

United States Court of Appeals

For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA,
a corporation,
Plaintiff and Appellant,

vs.

ROBERT T. GREENE, et al.,
Defendants and Appellees.

Appeal from the Judgment of the United States District Court for the Northern District of California (Southern Division) Honorable Lloyd Burke, Judge

APPELLANT'S OPENING BRIEF

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INDEX

Table of Authorities

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STATEMENT OF JURISDICTION

As alleged in Appellant's complaint for declaratory relief (Clerk's Transcript, pp. 1, 2) the defendants Isensee at all times were and are now citizens of the State of Oregon. Defendants Greene are citizens of the State of California. Appellant is a corporation incorporated under and by virtue of the laws of the State of Pennsylvania. The defendants Isensee have filed a lawsuit for personal injuries with a demand in excess of $10,000 in the Superior Court of the State

of California in and for the County of San Mateo, No. 105900, against defendants Greene as a result of an accident which occurred on July 14, 1962. Defendants Greene have demanded coverage of the Appellant and a defense of the aforesaid lawsuit by virtue of Appellant's Homeowners Policy No. H 15-79-08, which was issued to defendants Greene on July 2, 1962. Appellant denies that any coverage exists under the terms of said policy.

28 U.S.C. 2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Art. III, Sec. 2, Clause 1 of the United States Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; . . . as to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . ."

This declaratory relief action was filed in the United States District Court for the Northern District of California (Southern Division) on June 18,

1964. The District Court rendered judgment against the Appellant on June 27, 1966, which judgment was entered by the Clerk on June 30, 1966. (Clerk's Transcript, p. 35.)

28 U.S.C. 1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF CASE

This is an appeal from judgment of the United States District Court for the Northern District of California (Southern Division), the Honorable Lloyd Burke, Judge, Presiding, in an action for declaratory relief filed by the Appellant on June 18, 1964. Appellant seeks declaratory relief from affording insurance coverage under its Homeowner's Policy "B" No. H 15-79-08, issued to defendants Robert T. Greene and Helen K. Greene, July 2, 1962. (Plaintiff's Exhibit No. 3; RT pp. 2, 3.)

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

> "This Section does not apply:
>
> * * * * * * *
>
> b. under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . ."

On or about July 14, 1962, defendant Robert T. Greene, the son of defendants Stanley R. Greene and Helen K. Greene, was operating a gasoline motor driven "go-cart". He was involved in an accident with the person of defendant Charlotte Isensee whereby the latter allegedly sustained bodily injury. The place where the accident occurred was at a point fifty feet beyond or generally north of the rear property line of the defendants Greenes' property, and on an easement adjacent to the Newmayer property. (Plaintiff's Exhibit No. 1, RT p. 5.) This easement, called the Hickey easement, belonged to the Newmayers and constituted a private driveway to the Newmayer property. (Plaintiff's Exhibit No. 1.)

This easement was parallel to the Greenes' driveway. It was separated from the Greenes' driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the defendants Greenes' premises. The Hickey easement continued beyond the real property line of Greenes' property where it adjoined the Newmayer property and not that of Greenes. A wire fence extended from the northerly end of the wooden fence referred to above. This wire fence continued northerly with the Newmayer property to the east of it and the Hickey easement to the west of it. These fences are illustrated in Plaintiff's Exhibits No. 1, 2A, 2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' driveway to the easement constituting the Newmayer driveway. (RT pp. 40-41.)

ISSUES

As designated by the pretrial order (Clerk's Transcript, p. 18) the sole issue is whether the point at which the accident occurred was on "a way immediately adjoining" the Greenes' property and covered by policy No. H 15-79-08 issued by Appellant to the defendants Greene.

SPECIFICATION OF ERRORS

1. The District Court erred in finding and concluding that the accident occurred on "the ways immediately adjoining" the defendants Greenes' premises. (Clerk's Transcript, pp. 25-26; RT pp. 43-44.) The record clearly establishes (and it was so stipulated) that the accident in question occurred fifty feet north of the most northerly property line of Greenes' premises and on an easement known as the Hickey easement which constitutes the private drive of the Newmayer property. (Plaintiff's Exhibits Nos. 1, 2A, 2B, 2C; RT pp. 1, 41-43.)

2. The District Court erred in finding and concluding that the Appellant afforded coverage to defendants Greene under the terms of its policy No. H 15-79-08, and that the exclusions therein did not apply. (Clerk's Transcript, pp. 25-26; RT p. 44.) The said policy clearly states that no coverage for personal liability is provided while an automobile or midget automobile was being operated "while away from the premises or the ways immediately adjoining." (Plaintiff's Exhibits Nos. 3, 4 and 5.)

ARGUMENT

The term "immediately adjoining" as used in an insurance policy relating to operations conducted on or about the insured's premises, has been defined by this Court in *United States v. Great American Indemnity Company,* 214 F.2d 17 (9th Cir. 1954). In that case the insurance carrier insured a beauty shop which occupied a mezzanine of a building owned by the Federal government. The shop was connected to the public sidewalk by a stairway leading from the street level to an upper hall and entrance to the beauty shop. A woman fell and was injured on the sidewalk about two to three steps in front of the point where the stairway to the mezzanine joined the sidewalk. After the woman recovered judgment against the United States, the government sought indemnification against the insurer of the beauty parlor. The policy provided coverage for accidents occurring on the premises including buildings and structures and "the ways immediately adjoining." This Court stated at 214 F.2d p. 19 that the words "immediately adjoining" are unequivocal and have definite and certain meaning. "Adjoining means touching or contiguous, in contact with, as distinguished from lying near or adjacent. . . . When coupled with the word 'immediately' the word is used in its most restrictive sense." With respect to the beauty parlor contract this Court said at 214 F.2d p. 19:

> "While the entranceway and the hall immediately outside the beauty shop may well be included within the phrase 'ways immediately adjoining'

it would be totally unreasonable to say that coverage extended down the stairway and out onto the sidewalk."

Another insurance carrier insured a grocery store in the same building. The woman had fallen thirty-five feet west of the point where the grocery store's entrance contacted the sidewalk and several feet west of the nearest corner of the grocery store. With respect to this policy, this Court held at 214 F.2d p. 19 that the "restrictive words 'immediately adjoining' embrace at most that portion of the sidewalk abutting or touching the grocery store. The place of the fall being several feet west of the nearest corner of the grocery store, it was not within the terms of the policy." It was ruled that there was no coverage under either policy.

In *Long v. London and Lancashire Indemnity Company of America,* 119 F.2d 628 (6th Cir. 1941) the Court was considering the meaning of the phrase "immediately adjacent" to the insured premises. The insured's dog had started to chase the plaintiff from the road immediately adjacent to the insured premises and then struck the plaintiff's motorcycle on a public street at a point sixty feet beyond the insured's property line. In holding the exclusion applicable the Court pointed out that the words "immediately adjacent" when used together mean "with no space intervening or next, as 'immediately adjoining'." To adopt some other meaning would negate the use of the word "immediately".

The Court went on to say at 119 F.2d p. 630:

> "We think the words 'immediately adjacent' as used in the insurance policy under construction, have the same natural significance as the words 'immediately adjoining'. Unless such construction be adopted, the word 'immediately' in the present context would have no practical effect. Its express use must not be disregarded. *If the insurance company had intended to cover an accident on ways adjacent to the insured premises, there would have been no occasion for using the qualifying word 'immediately' in conjunction with the word 'adjacent' . . . If the policy coverage had been intended despite intervening space, the insurer would have used some such expression as 'closely adjacent' or 'nearly adjacent'.*" (Emphasis added.)

The case at bar is not distinguishable from the *Great American* case, supra, nor from the *Long* case, supra. It would seem that in light of these decisions, the term "ways immediately adjoining" should be confined at most to those ways which are touching the Greenes' property or ways over which they have direction and control. This clearly was the intent of the Appellant from the language used in the policy. The accident of July 14, 1962, did not occur on the insured premises nor on a "way" that was touching or contiguous or in contact with the insured premises. It occurred fifty feet to the north of such an area.

When this clear and unequivocal language is used in a policy of insurance, any extension of coverage

beyond the physical geographical limits defined by the policy would be unreasonable and arbitrary. In holding as it did, it would seem that the District Court has accepted an argument that was rejected by this Court in the *Great American* case, supra, and by other Courts in the *Long* case, supra, and in *National Optical Company v. United States Fidelity and Guaranty Company,* 77 Colo. 130, 245 Pac. 343. In the last case, the insured's delivery boy was in an accident while operating his bicycle on the sidewalk six blocks from the insured premises. It was claimed that the point of the accident was on a way immediately adjoining the premises as the sidewalk could be traced from the site of the accident to the point where it touched the insured premises.

It can be concluded from the cases cited, that given the clear language of the policy, it makes no difference whether the accident occurred a few feet, fifty feet, sixty feet or six blocks beyond the point where the "way" ceases to immediately adjoin the insured premises. In any case, there is no coverage afforded.

CONCLUSION

The accident in question did not occur on the defendants Greenes' premises nor on the ways immediately adjoining them. It is submitted that the decision of the District Court should be reversed and judgment entered in favor of Appellant.

Dated, San Jose, California,
October 25, 1966.

Respectfully submitted,
POPELKA, GRAHAM, HANIFIN,
VAN LOUCKS & ALLARD,
By FRED J. GRAHAM,
MALCOLM A. KING,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in conformance with those rules.

Dated this 25th day of October, 1966.

POPELKA, GRAHAM, HANIFIN,
VAN LOUCKS & ALLARD,
By MALCOLM A. KING,
Attorneys for Appellant.

(Appendix Follows)

Appendix

Appendix of Exhibits

	Reporter's Transcript of Trial		
Plaintiff's Exhibits	**Identified**	**Offered**	**Received**
Number 1	1	1	3
Number 2A	2	2	3
Number 2B	2	2	3
Number 2C	2	2	3
Number 3	2	2	3
Number 4	2	2	3
Number 5	3	3	3